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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

16 IN RE: Bard IVC Filters Products Liability  
17 Litigation

No. 2:15-MD-02641-DGC

18 LISA HYDE and MARK HYDE, a married  
19 couple,

**DEFENDANTS' REPLY IN  
SUPPORT OF ITS MOTION TO  
BIFURCATE TRIAL**

20 Plaintiffs  
21 v.  
22 C. R. BARD, INC., a New Jersey  
corporation and BARD PERIPHERAL  
23 VASCULAR, INC., an Arizona  
corporation,  
24  
Defendants.

(Assigned to the Honorable David G.  
Campbell)

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1           Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively  
 2 “Bard”) respond to the plaintiffs’ opposition to its motion to bifurcate as follows:

3 **I. Federal Law Governs Bifurcation of the Plaintiffs’ Claims**

4           In federal courts, federal law governs bifurcation. *See, e.g., Hopkins v. Dow*  
 5 *Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994). Thus, the plaintiffs’ argument that  
 6 Wisconsin bifurcation law should govern the Court’s approach to Ms. Hyde’s case should  
 7 fail.

8           Federal courts will look to state law regarding bifurcation only if there is no  
 9 conflict between Fed. R. Civ. P. 42(b) and the relevant state bifurcation rule. But if a  
 10 conflict exists, then federal law governs. *Rosales v. Honda Motor Co.*, 726 F.2d 259, 262  
 11 (5th Cir. 1984) (upholding district court’s bifurcation of liability and damages issues  
 12 pursuant to federal rules because of conflict with state law); *Simpson v. Pittsburgh*  
 13 *Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990) (holding bifurcation is procedural and  
 14 applying federal rules); *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 24 (6th Cir. 1965)  
 15 (upholding bifurcation under federal rules).

16           The plaintiffs’ argument that Wisconsin law allows bifurcation of claims but not  
 17 issues demonstrates that Wisconsin law, W.S.A. 895.05(2), conflicts with Rule 42(b),  
 18 which explicitly allows for bifurcation of claims and issues. Unlike in Wisconsin, Rule 42  
 19 affords district courts discretion to bifurcate issues, and places no limitations on how a  
 20 federal court exercises its discretion to separate a trial into different phases. *See* Fed. R.  
 21 Civ. P. 42 (“For convenience, to avoid prejudice, or to expedite and economize, the court  
 22 may order a separate trial of one or more separate issues, claims, crossclaims,  
 23 counterclaims, or third-party claims.”); *Allstate Ins. Co. v. Breeden*, 410 F. App’x 6, 9 (9th  
 24 Cir. 2010) (noting wide discretion of trial court to bifurcate issues and claims); *M2*  
 25 *Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1088 (9th Cir. 2005) (same);  
 26 *Arthur Young & Co. v. U. S. Dist. Court*, 549 F.2d 686, 697 (9th Cir. 1977) (same).  
 27 Federal law grants the Court great latitude to structure the trial and presentation of  
 28 separate issues and claims, including the issue of punitive damages calculation from the

1 remainder of triable issues, as needed to achieve the goals expressed in Rule 42(b).  
 2 Conversely, the plaintiffs argue that Wisconsin law handles bifurcation differently.  
 3 *Waters v. Pertzborn*, 243 Wis. 2d 703, 717, 627 N.W.2d 497, 503 (Wis. 2001) (“Unlike  
 4 Federal Rule 42, [805.05(2)] does not permit bifurcation of issues, but only separate trial  
 5 of discrete claims.”) (citations omitted). Because of the conflict of approaches between  
 6 federal law and Wisconsin law, federal law alone should govern the Court’s approach in  
 7 Ms. Hyde’s case.

8 **II. Introduction of Bard’s Financial Condition is Prejudicial, and Irrelevant To  
 9 The Issues of Liability, Compensatory Damages, and Entitlement to Punitive  
 Damages**

10 Bard does not seek to completely exclude evidence of its financial condition, but  
 11 rather is asking the Court to use the same procedure that worked well in *Jones* and  
 12 *Booker*: ensure that evidence regarding Bard’s financial condition and profits is  
 13 considered by the jury only if and when it is relevant—during the determination of a  
 14 punitive damages award—and not during the liability phase of trial. *See Danes v. Senior*  
 15 *Residential Care of Am., Inc.*, No. 04-C-594, 2007 WL 30880, at \*3 (E.D. Wis. Jan. 4,  
 16 2007) (“In light of the fact that any claim for punitive damages will be excluded, evidence  
 17 relating to the finances of the defendant is not relevant and therefore shall be precluded  
 18 pursuant to Rule 402.”).

19 Moreover, federal courts have found that the introduction of a defendant’s wealth  
 20 is prejudicial enough to warrant conducting a separate phase at trial dedicated solely to  
 21 determining the amount of punitive damages. *In re Collins*, 233 F.3d 809, 811 (3d Cir.  
 22 2000) (upholding MDL panel’s decision to withhold remand of punitive damages for trial  
 23 and observing the fact that evidence of wealth is not considered when determining  
 24 compensatory damages as one reason for “allowing new trials devoted solely to  
 25 determining punitive damages.”); *Monroe v. Griffin*, No. 14-CV-00795-WHO, 2015 WL  
 26 5258115, at \*6 (N.D. Cal. Sept. 9, 2015) (allowing bifurcation of liability and entitlement  
 27 to punitive damages from punitive damages amount, and determining that “evidence of  
 28 defendants’ financial condition will only be admissible in the second phase of the trial”).

1 Evidence about Bard's financial status during the liability portion of the trial could  
 2 potentially cause the jury to improperly factor Bard's financial status into their analysis of  
 3 liability and compensatory damages, and thus would be highly prejudicial to Bard.

4 **III. Bifurcation Will Not Waste Time or Resources**

5 Finally, the plaintiffs' statement that a separate punitive damages phase will lead to  
 6 duplicative evidence, and will waste of time and resources, is inaccurate and inconsistent  
 7 with the parties' experience in *Booker*. The transcript from the punitive damages phase of  
 8 *Booker* reveals that the entire second phase of trial lasted less than two hours. This  
 9 minimal time commitment during what will be a weeks-long trial is not a waste of time,  
 10 particularly when balanced against the prejudice that Bard will face if its financial  
 11 condition is considered by the jury during its deliberation of liability and compensatory  
 12 damages. Moreover, during the *Booker* and *Jones* bellwether trials, the plaintiffs argued  
 13 numerous times that they had too little time to present their case-in-chief. Yet now, they  
 14 seek to inject the issue of financial condition into the case-in-chief, which will further  
 15 shorten their time for an issue that is relevant solely to consideration of a punitive  
 16 damages award. As in *Booker* and *Jones*, bifurcation of Bard's financial condition serves  
 17 to make trial more, not less, efficient.

18 **IV. Conclusion**

19 For the foregoing reasons, the trial of this case should be bifurcated in accordance  
 20 with the Rule 42(b).

21 RESPECTFULLY SUBMITTED this 28th day of August, 2018.  
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**Attorneys for Defendants C. R. Bard, Inc. and  
Bard Peripheral Vascular, Inc.**

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of August, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/Richard B. North, Jr.  
Richard B. North, Jr.